APPEAL NO. 93048

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On December 16, 1992, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that the appellant, claimant herein, sustained an injury to her thigh, but not her back, in the course and scope of her employment on (date of injury) and that the thigh injury did not result in disability. Carrier was relieved of liability for the thigh injury because claimant failed to timely report the work-related nature of her injury.

Claimant contends that the hearing officer misapplied the facts, that claimant did report her injury when the employer's human resource manager took claimant to the doctor, that claimant's herniated disc was incurred on (date of injury), and requests that we reverse the hearing officer's decision and render a decision in her favor. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

We affirm the hearing officer's decision that claimant sustained an injury to her thigh, but not her back, in the course and scope of her employment on (date of injury) and that the thigh injury did not result in disability. We reverse the hearing officer on the issue that claimant failed to timely report the work-related nature of her thigh injury.

The parties were unable to resolve their dispute at the benefit review conference and the following issues were framed at the CCH:

Whether Claimant's current disability resulted from an injury of (date of injury);

Whether Claimant sustained an injury in the course and scope of her employment on (date of injury);

Whether Claimant's alleged injury of (date of injury), caused her alleged back problems; and

Whether Claimant timely notified her employer of her alleged on-the-job injury of (date of injury).

The testimony was that claimant was a 27-year-old employee of (emplopyer) which was owned by (parent company), hereinafter collectively called the employer. Claimant testified that on (date of injury), while she was lifting and moving boxes of curtains, she had a sudden onset of pain in her left leg. Claimant further testified that she notified her immediate supervisor of the injury; however, no paperwork was filled out and claimant's supervisor thought it was just a cramp in claimant's leg. Claimant continued work that day.

Claimant testified that she again reported the injury to her supervisor the next working day, which was Monday, March 25, 1991. Claimant's supervisor completed some paperwork and employer's human resource manager drove her to see (Dr. M).

Claimant testified she reported her injury was work related but employer's human resource manager denied this and testified that he did not learn of claimant's allegation that the injury was work related until September 1992. Dr. M's records do not reflect a work-related injury. Claimant testified she was dissatisfied with Dr. M, who claimant felt was the company doctor, and later on March 25th, went to her primary care physician, (Dr. W). Dr. W diagnosed a left thigh strain and placed claimant on light duty. Dr. W's progress notes show claimant's employer called Dr. W on April 4, 1991 and "wanted to know if this [claimant's injury] is work related--refused to disclose any info. Told to call pt." There was testimony at the CCH that claimant had told others that her leg problems may have been due to a congenital problem, "bad veins" or standing on concrete. Claimant did not lose any time from work and did not have a reduction in pay as a result of being placed on light duty for her thigh injury. Claimant continued to work until December 1991 when she was involved in an automobile accident. Claimant testified she did not go back to work after the automobile accident because she was pregnant and she went on maternity leave. Claimant testified she was eventually terminated because she had exceeded the six months permitted for leaves of absences. In August 1992, while shopping at a local retail store, claimant experienced severe leg pain and sought treatment from (Dr. N). Dr. N records he saw claimant on 8-5-92 with complaints of left leg pain radiating up to the central back. Dr. N's progress notes show claimant continued to complain of numbness and pain and an MRI was done on 8-18-92. The doctor's conclusion was "[d]egenerative disk disease at L5-S1 with protrusion or herniation of the disk centrally and to the left."

The hearing officer found that claimant had injured her left thigh in the course and scope of employment on (date of injury), that claimant had reported the thigh pain to her supervisor but failed to report that the pain was work related. The hearing officer also found that claimant lost no time from work and, consequently, did not have disability as a result of her thigh injury. The hearing officer further found the herniated disc diagnosed August 18, 1992 was not related to the injury claimant sustained on (date of injury). Claimant appeals contending "she reported her work related injury to her immediate supervision (sic) and . . . her employer's Human Resource Manager," that the "sharp, sudden onset of thigh pain on (date of injury)" proved she had a herniated disc, and that Dr. N's medical records and claimant's statement proved that her herniated disc was a result of her (date of injury) accident at work.

One of claimant's allegations on appeal is that the hearing officer "incorrectly states that [employer's human resource manager] took Claimant from work to the doctor's (sic) on the Monday following her injury on Friday." Claimant's attorney maintains claimant was taken to Dr. M on the same day as the injury. A review of the transcript on pages 18 and

19 substantiates the hearing officer's statement of the evidence that the employer's human resource manager took claimant to see Dr. M on Monday, March 25th, following the Friday, March 22nd injury.

As previously noted, the hearing officer found that claimant had injured her left thigh in the course and scope of employment "but did not report to any Employer or Carrier representative the alleged work-related nature of this pain until August of 1992." However, a review of the record discloses that it was claimant's uncontradicted testimony that she had told her supervisor, (Ms. H), that she had injured herself on Friday, March 22nd, shortly after she felt the leg pain. It was further claimant's uncontradicted testimony that the supervisor said ". . . it probably (sic) go away, you know, just probably a cramp. . . ." It is again the uncontradicted testimony of claimant that she again reported the injury to her supervisor on Monday, March 25th, and that the supervisor then called (Mr. R), the human resource manager. Although Mr. R testified that he was not told the thigh injury was work related until September 1992, and the hearing officer is entitled to believe Mr. R, it is undisputed that Mr. R took claimant to see Dr. M on company time. Further, we note that it is the undisputed evidence that the employer called Dr. W on April 4, 1991 to ask if claimant's thigh injury was work related. As stated above, Mr. R can testify he was not told that claimant alleged a work-related injury, but there is no evidence, testimonial or otherwise, from Ms. H, the immediate supervisor, as to what claimant told her regarding the work related nature of her thigh injury. The testimony of a claimant alone can establish that timely notice of injury was provided. An exception to the rule that the uncontradicted testimony of an interested witness, as is the claimant in this case, cannot be considered as doing more than raising an issue of fact, exists "when the testimony of the interested witness is clear, direct, and positive, and there are no circumstances in evidence tending to discredit or impeach such testimony." Anchor Casualty Company v. Bowers, 393 S.W.2d 168 (Tex. 1965). In this case, claimant clearly, directly and positively stated she reported a work-related thigh injury to her immediate supervisor, Ms. H, both at the time of the incident and again a few days later. There was no evidence that claimant did not so report to Ms. H. The circumstances surrounding this testimony, such as an employer representative taking claimant to the doctor on company time and the employer subsequently asking another doctor whether the injury was work related, would tend to support, rather than discredit or impeach, claimant's testimony that she told Ms. H about the work-related injury shortly after it occurred and again on the following Monday. The fact that the April 4, 1991 telephone call was placed to Dr. W would indicate the employer, at least, considered the possibility that the thigh injury was work related. Dr. M's statement that the injury was "not work related" does not negate that claimant believed it was work related and so informed Ms. H. On this point we must reverse and render, finding that claimant advised her supervisor, Martha Hatchel, that she injured her thigh in a work-related incident on (date of injury), and again reported the injury on March 25, 1991. We render a decision that the carrier is liable for payment of benefits under the 1989 Act for claimant's thigh injury since claimant timely informed her supervisor of the work-related injury.

Article 8308-6.34(e) provides, and we have repeatedly held, that the hearing officer is the sole judge of the relevancy and materiality of the evidence and of the weight and credibility to be given the evidence. *See* Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. As the hearing officer stated at the beginning of the CCH, the burden of proof is on the claimant to prove that she was injured in the course and scope of her employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). Claimant continued to work until her December 1991 automobile accident. Although claimant testified that her back condition was related to the thigh condition, the medical records indicate claimant did not complain about her back until she saw Dr. N in August 1992, some 16 months after her March 1991 leg complaints. There is also testimony that her leg complaints may have been due to a congenital condition or "bad veins." Further, while claimant testified she was inactive after the March injury, there are statements to the contrary. Claimant's theory that she could only have injured her back in the March 22nd incident involving the thigh injury, discounts the December 1991 automobile accident and her pregnancy. When presented with such conflicting evidence, the trier of fact may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694, 697 (Tex. 1986). The hearing officer saw and heard the testimony and observed the demeanor of the witnesses, including the claimant. The hearing officer obviously chose to disbelieve claimant in making his findings on this point. Where, as here, there is sufficient evidence to support the hearing officer's determinations, there is no sound basis to disturb his decision. Only if we were to determine, which we do not in this case, that the determinations of the hearing officer were so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust would we be warranted in setting aside the hearing officer's decision. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.); In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Appeal No. 92232, *supra*. Applying these standards of review, we affirm the hearing officer's finding that claimant's herniated disc diagnosed August 18, 1992 is not related to any injury claimant sustained on (date of injury).

We affirm the hearing officer's decision that claimant injured her thigh, but did not injure her back, in the course and scope of her employment on (date of injury), and that claimant's thigh injury did not result in disability. We reverse the hearing officer's decision that the carrier is relieved of liability for claimant's thigh injury because claimant failed to make a timely report of the alleged work related nature of her injury and render a new decision on that issue that carrier is liable for payment of whatever benefits under the 1989 Act that claimant may be entitled to for her thigh injury.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge